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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES J. DAGOSTINO, Individually and as Trustee, etc., et al., Plaintiffs and Respondents, v. LPL FINANCIAL, LLC, Defendant and Appellant.	D069541 (Super. Ct. No. 37-2014-00037482-CU-FR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Markun Zusman Freniere & Compton, David S. Markun, Edward S. Zusman and Kevin K. Eng for Defendant and Appellant.

Law Offices of Timothy C. Karen and Timothy C. Karen for Plaintiffs and Respondents.

Plaintiffs, investors with accounts at LPL Financial, LLC (LPL), allege they loaned $375,000 to their financial adviser, Daniel Schmidt, who said he would use the

money to develop a resort in Hawaii. After Schmidt defaulted on the loans, plaintiffs filed a first amended complaint for alleged financial elder abuse and related causes of action against Schmidt and LPL. Almost nine months later, LPL petitioned to compel arbitration of plaintiffs' claims. The court denied the petition, finding LPL waived its contractual right to arbitrate by unreasonably delaying its arbitration demand and by seeking to litigate plaintiffs' claims on the merits, causing plaintiffs prejudice. LPL contends the court erred by denying its petition to compel arbitration, primarily asserting (1) the claims alleged in the first amended complaint were not within the scope of the arbitration provision, and (2) plaintiffs were not prejudiced by the delay in seeking arbitration. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Loans to Schmidt*

As alleged in the first amended complaint, LPL is a broker-dealer and registered investment adviser, having approximately 13,300 brokers, 6,500 offices, and 4.3 million customers nationwide. Schmidt held securities licenses, was a branch manager for LPL, and was authorized by LPL to provide investment and financial advice.

Plaintiffs, who are over 65 years old, allege they were clients of Schmidt and LPL for retirement planning and investment management.

Plaintiffs allege that while acting as their LPL adviser, Schmidt solicited them to loan him a total of $375,000. Schmidt told plaintiffs he needed the money to develop a resort in Hawaii, called the " 'Pakalana Sanctuary.' " He said the project would generate

income from vacation and event rentals, and their loans would be secured by the property.

In June 2012, Leslie and Marilyn Wyman loaned Schmidt $25,000 at 6 percent interest, under a promissory note entitled "Mortgage Loan Note," but which was actually unsecured. In September 2012, the Wymans loaned Schmidt another $175,000, at 5 percent interest, in another unsecured note also entitled "Mortgage Loan Note." The first amended complaint alleges, "Schmidt liquidated securities the Wyman Plaintiffs' [*sic*] had on account with LPL . . . in order to generate the cash necessary for this investment." (Some capitalization omitted.)

In November 2012, James J. Dagostino and Carolyn Steeves loaned Schmidt $175,000 at 5 percent interest, under an unsecured promissory note entitled "Mortgage Loan Note." The first amended complaint alleges that "Schmidt liquidated securities the Dagostino Plaintiffs' [*sic*] had on account with LPL . . . in order to generate the cash necessary for this investment." (Some capitalization omitted.)

B. *Plaintiffs' Theories Against LPL as Alleged in the First Amended Complaint*

Plaintiffs allege they were not provided with risk disclosures or financial statements for these loans. They contend the loans were "a highly speculative securities investment" because repayment depended "entirely upon the financial condition of Schmidt, who was in the process of a divorce, and the success of Pakalana Sanctuary, which had no track record or earnings history." (Some capitalization omitted.) Plaintiffs allege that unbeknownst to them, Schmidt "had developed a substance abuse problem and a drug dependency, and this addiction further increased the risk that the investment would

fail." They allege these investments were unsuitable for them in light of the "high degree of risk."

Plaintiffs allege LPL "knew, or should have known" that Schmidt was engaged in these loan transactions. They further allege Schmidt was "a management level agent of LPL," such that "his actions were those of LPL . . . regardless of whether or not other person affiliated with LPL . . . knew about Schmidt's actions." (Some capitalization omitted.) Plaintiffs also allege LPL "recklessly failed to exercise adequate supervision over Schmidt and that this failure was symptomatic of lax supervision and compliance at the firm at the time of the transaction[s] . . . ." (Some capitalization omitted.)

Plaintiffs allege Schmidt defaulted on the notes. They assert LPL is liable for their losses on the following legal theories: breach of fiduciary duty, constructive fraud, tort of another (for attorney fees), professional negligence, breach of a duty to supervise Schmidt, and violation of certain provisions in the Corporations Code and "California's Blue Sky laws."

C. *The Arbitration Provision*

In establishing accounts at LPL, plaintiffs "reviewed and accept[ed] the Master Account Agreement . . . ." The master account agreement contains an arbitration provision, stating in part:

> "In consideration of opening one or more accounts for you, you agree that any controversy between LPL arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement, whether entered into prior, on or subsequent to the date hereof, shall be settled by arbitration in

> accordance with the rules, then obtaining of the National Association of Securities Dealers, Inc."[1]

In an apparent attempt to plead around this arbitration provision, plaintiffs' first amended complaint contains a cause of action entitled "Declaratory Relief." There, plaintiffs allege the Schmidt promissory notes state that upon default, "Lender may file a lawsuit . . . to collect the unpaid principal amount of the loan plus unpaid interest." Plaintiffs allege Schmidt was a "management level agent" of LPL, "empowered to bind" LPL to these terms. Plaintiffs sought a judicial declaration "that the terms quoted above amount to a waiver of any contractual arbitration . . . ."

D. *Case Management—No Motion to Compel Arbitration*

LPL did not respond to the first amended complaint with a motion to compel arbitration. Instead, in February 2015 it answered with a general denial and 18 affirmative defenses. LPL did not plead the arbitration agreement as an affirmative defense.[2]

In April 2015, the court conducted a case management conference. Although the case management statement form contains a space for requesting binding arbitration, LPL instead requested a court trial. LPL indicated it would participate in a settlement conference or neutral evaluation, but not arbitration. LPL indicated it expected to move

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1 The National Association of Securities Dealers is now known as the Financial Industry Regulatory Authority, or FINRA.

2 An agreement to arbitrate is an affirmative defense and, "[a]t a minimum, the failure to plead arbitration as an affirmative defense is an act inconsistent with the later assertion of a right to arbitrate." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 (*Guess?*).)

for summary judgment and planned to depose plaintiffs within four months. The court set trial for December 11, 2015.

Discovery ensued. Plaintiffs propounded and LPL responded to form interrogatories, special interrogatories, and requests for admission. LPL deposed the four plaintiffs.

E. *Plaintiffs File a Motion for Summary Adjudication*

In July 2015, plaintiffs filed a motion for summary adjudication. Plaintiffs sought adjudication of 37 issues, including that the Schmidt notes were unregistered securities, and LPL was therefore liable for selling unregistered securities. They also sought summary adjudication that LPL owed them a fiduciary duty. Further, plaintiffs sought summary adjudication against LPL on its 18 affirmative defenses. The accompanying memorandum of points and authorities contain an eight-page legal analysis to support plaintiffs' theory the Schmidt loans were securities and LPL violated corporate securities law.

F. *LPL Files a Motion for Summary Judgment*

In August 2015, LPL filed a motion for summary judgment or, in the alternative, summary adjudication. LPL sought summary judgment on the grounds: (1) the undisputed evidence showed LPL did not participate in Schmidt's loans, did not know about them, and did not take part in any sale of any securities and, in any event, the loans were not securities; (2) as a matter of law, it had no duty to supervise the Schmidt loans; and (3) the declaratory relief cause of action should be dismissed because "[i]t is based on an issue that has not been raised in this action . . . ." LPL supported its motion with

excerpts of plaintiffs' deposition testimony, a declaration by Schmidt, and a 170-page statement of undisputed material facts.

In September 2015, after contentious discovery disputes arose, the court continued the parties' respective motions for summary adjudication and summary judgment to January 2016 and continued the trial to March 25, 2016. The discovery disputes were complex and according to the court, involved "potentially a million documents as well as protocols and methods of obtaining electronically stored information in a reasonable and expedited manner." In November 2015, the court appointed a referee to "hear and determine any and all discovery motions and disputes relevant to discovery in this action and to report findings and make a recommendation thereon."

G. *Plaintiffs File a Second Amended Complaint*

In October 2015, while LPL's summary judgment motion was pending, plaintiffs sought leave to file a second amended complaint. The first 99 allegations in the proposed second amended complaint are identical to the entire first amended complaint. In the proposed second amended complaint, "as a result of discovery and further investigation," plaintiffs sought to add allegations relating to "extensive . . . supervisory problems" at LPL and "the existence of predicate transactions that necessarily preceded the fraudulent loans that are the subject of this case" and "amounted to violations not currently alleged" in the first amended complaint. (Italics omitted.)

More specifically, the proposed second amended complaint contains more details regarding LPL's alleged failure to properly supervise Schmidt. For example, the second amended complaint alleges Schmidt began borrowing money from LPL clients in 2009

and borrowed a total of $2.2 million from 11 LPL clients. Plaintiffs further alleged that if LPL had "properly supervise[d] Schmidt during this time, it could have detected the borrowing and prevented him from borrowing before he borrowed from plaintiffs." (Some capitalization omitted.) The proposed second amended complaint also alleges LPL failed to adequately monitor Schmidt's e-mails and failed to require all LPL representatives to report suspected misconduct.

The proposed second amended complaint also adds details concerning the plaintiffs' LPL accounts that Schmidt liquidated to fund the loans. For example, it alleges the $150,000 the Wymans loaned came from their "Genworth Financial funds." Similarly, the proposed second amended complaint alleges Schmidt liquidated the Dagostinos' Genworth account for their $175,000 loan.

In October 2015, over LPL's opposition, the court granted plaintiffs leave to file the second amended complaint. The court allowed LPL to file a new summary judgment motion "responsive" to the new complaint, and continued the hearing on the motions for summary judgment and summary adjudication to May 2016. The court continued the trial date to August 2016.

H. *LPL Seeks to Compel Arbitration*

In November 2015, LPL filed a motion to compel arbitration. Explaining why it was filing the motion *nine months* after answering the first amended complaint, LPL asserted the allegations in the first amended complaint were outside the scope of the arbitration clause because that complaint "did not contain any allegations that implicated securities transactions through LPL and did not mention that injury arose from conduct

pertaining to LPL accounts." LPL asserted that until the second amended complaint, "[t]here [were] no allegations that any securities that were bought through LPL . . . were improperly liquidated by . . . Schmidt . . . ." LPL argued the second amended complaint contained "new allegations" asserting "for the first time in this litigation" that LPL is liable for liquidating securities held in the plaintiffs' accounts. LPL concluded, "Plaintiffs' own amended allegations, therefore, have . . . triggered LPL's right to compel arbitration . . . ."

LPL anticipated plaintiffs would assert LPL waived any right to arbitrate by actively litigating the case. Citing *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes Medical Center*), LPL asserted the court should consider six factors in determining waiver. LPL argued there was no waiver, and no prejudice to plaintiffs by being compelled to arbitrate because: (1) Plaintiffs "original allegations did not implicate the arbitration provisions in their agreements"; and (2) plaintiffs "cannot assert that they are prejudiced when their amendments to avoid summary judgment implicate an arbitration agreement . . . ."

Opposing the motion, plaintiffs stated LPL's purported explanation for not seeking arbitration earlier was a pretext. Plaintiffs' counsel explained that LPL chose to litigate and not arbitrate—not because the claims made in the first amended complaint were not within the scope of the arbitration provision—but instead because LPL made a deliberate tactical decision to litigate. Counsel stated:

> " 'Selling away' refers to an illicit stockbroker-client transaction that is not approved by the securities firm. Attorney David Markun, LPL's attorney in this case, claims to have successfully defended

> selling away cases several times in court, winning on summary judgment. Earlier in this case, Markun expressed confidence the court would grant summary judgment in favor of LPL. This took place during a break in the deposition of one of the Plaintiffs. . . . Markun told me that he, or his firm, had prevailed repeatedly in Court in selling away cases by winning summary judgment and that from a Plaintiffs' [*sic*] perspective, I would have done better had I filed the case as a FINRA arbitration rather than as a court case."

Plaintiffs argued that by taking their depositions and by filing a motion for summary judgment, LPL had not only acted inconsistently with an intention to arbitrate, but had also invoked procedures unavailable in FINRA arbitration. Citing FINRA arbitration rule 12510, plaintiffs' counsel stated:

> "Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including: [¶] To preserve the testimony of ill or dying witnesses; [¶] To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing; [¶] To expedite large or complex cases; and [¶] If the panel determines that extraordinary circumstances exist."

Plaintiffs' counsel also cited FINRA arbitration rule 12504, which generally prohibits summary judgment and summary adjudication motions by providing in part: "Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration." Plaintiffs' counsel stated, "Summary judgment/adjudication is not a motion recognized under FINRA rules, which only permit motions to dismiss under limited circumstances under Rule 12504."

Plaintiffs' counsel also stated he was "handling this case on a contingency basis and therefore, I do not keep contemporaneous records of time spent on this case." Nevertheless, stating, "this case has been my most heavily litigated case during the time it

has been pending" he estimated hourly fees (at $350 per hour) would "definitely be in the six figures" for time spent before LPL sought arbitration. He asserted plaintiffs had incurred approximately $14,200 in costs "before arbitration was first raised by LPL."

In reply, LPL asserted the first amended complaint was not arbitrable because securities transactions were not the basis for the alleged liability. LPL asserted "because no liability was alleged in relation to activities arising out of or relating to their accounts, the LPL arbitration provision was not invoked by the [first amended complaint]." LPL denied that its decision to not compel arbitration early was based on a strategy to seek summary judgment. LPL also disputed whether FINRA arbitration rules would have allowed a motion to dismiss.

I. *The Court Denies LPL's Motion to Compel Arbitration*

After conducting a hearing, the court denied LPL's motion to compel arbitration, determining LPL waived arbitration and plaintiffs were prejudiced. The court stated:

> "You can't use the court system and take up our time in discovery and counsel's time in discovery and try—almost completely try this case in the state court and then request, by way of motion to compel arbitration, arbitration. . . . It's a waiver, and it's abuse of the system. You committed to the state court by your actions, you're going to try it in the state court and it's not going to go by way of arbitration."

In the subsequent written order, the court rejected LPL's argument that it did not seek arbitration earlier because the claims stated in the first amended complaint did not implicate securities transactions or plaintiffs' LPL accounts. The court noted the arbitration provision "is very broad here and would not depend on injury related to specific securities' accounts." Quoting paragraph 30 of the first amended complaint, the

court stated, "The [first amended complaint] alleges securities transactions in the LPL accounts and that Schmidt liquidated the accounts in order to generate the cash necessary for this investment." The court concluded, "Arguably, these allegations would have been enough to compel the case to arbitration."

The court found LPL acted inconsistently with seeking arbitration, stating:

> "Arbitration is not mentioned in the answer. At the Case Management Statement filed on April 15, 2015, LPL checked the box for a non-jury trial [item 5], estimated a 5 day trial [item 7a]. No mention of arbitration. Perhaps most damning, LPL filed a motion for summary judgment/adjudication and pursuant to that effort, LPL took the depositions of the Plaintiffs. Depositions and Summary Judgment Motions are generally not permitted in FINRA arbitration except in certain circumstances that do not apply in this case. [¶] . . . [¶]
>
> "It is clear to the court that 'the litigation machinery has been substantially invoked and the parties were well into preparation of the lawsuit before notification of the intent to arbitrate.' "

The court also found LPL's delay in seeking arbitration was unreasonable, stating:

> "The original trial date was December 11, 2015 in this case. The issue of arbitration was raised by LPL near the trial date. LPL's answer was signed on February 27, 2015. LPL's motion to compel arbitration was signed on November 24, 2015. It took LPL roughly 9 months to formally move for arbitration in this case and that is a long delay given all the intense activity that has taken place in this case since the time LPL filed its answer."

Further, the court determined plaintiffs were prejudiced:

> "The court further finds that bolting for the arbitration forum at this late stage in the proceedings would be prejudicial to plaintiffs. It is clear to the Court that plaintiff acted in reliance on the fact that this case was not going to arbitration. [¶] Both sides accuse each other of gamesmanship in this case. However, with respect to the issue of 'waiver,' it is the conduct of defendant that is most relevant. Based

on the activity in this case, the Court finds that defendant clearly waived any right to arbitrate this matter."

This appeal followed.[3] (Code Civ. Proc.,[4] § 1294, subd. (a).)

DISCUSSION

I. *CHOICE OF LAW*

Initially, we consider the parties' contentions concerning whether federal or state law of arbitrability applies. In the trial court, LPL asserted, "[T]he law of arbitrability under the [Federal Arbitration Act] and California Law is substantially the same as applied in this case . . . ." In its motion to compel arbitration, LPL relied on California case law, citing *St. Agnes Medical Center, supra*, 31 Cal.4th 1187, as stating the governing standard for determining arbitration waiver.

On appeal, LPL has changed positions. Citing *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*)—decided four years before LPL moved to compel arbitration here—LPL contends the robust federal policy in favor of arbitration requires federal law of arbitrability to be applied in determining waiver. Unlike its trial court papers, which cited California case law, on appeal LPL's opening brief cites some 18 federal cases it asserts show the court erred in determining waiver. LPL's brief cites only three California cases, which LPL presents as an "alternative[]" argument.[5]

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3 The parties advise that Schmidt is not a party to this appeal.

4 All statutory references are to the Code of Civil Procedure unless otherwise specified.

5 On its facts, *Concepcion* is off-point because it involved unconscionability, not waiver. The United States Supreme Court determined the FAA prohibited California

It is unnecessary to decide whether the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) or California law governs in this case. Other California courts confronting this issue have concluded there is "no meaningful difference between waiver principles under the FAA or California law as they apply to agreements to arbitrate." (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1041 (*Bower*); see also *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 444 (*Lewis*) [finding that under the FAA and the California Arbitration Act, "courts apply the same standards in determining waiver claims"].)

In *St. Agnes Medical Center, supra,* 31 Cal.4th at pages 1195-1196, the California Supreme Court stated that factors used to assess waiver under federal law were also relevant and properly considered under California law. The *St. Agnes Medical Center* test for determining if a waiver has occurred "is consistent with the majority position among the federal circuits." (*Lewis, supra,* 205 Cal.App.4th at p. 445, fn. 2.) Consequently, our disposition does not turn on whether the FAA or California law applies. (*Bower, supra,* 232 Cal.App.4th at pp. 1041-1042.) We consider the federal cases LPL cites to the extent they are persuasive. (*Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.* (2013) 216 Cal.App.4th 378, 389.)

II. *GENERAL PRINCIPLES AND THE STANDARD OF REVIEW*

"California law favors arbitrations as a relatively quick and cost-effective means to resolve disputes." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944.) Under section

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from conditioning the enforceability of an arbitration agreement on the availability of arbitration for class wide claims. (See discussion in *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 845 (*Roberts*).)

1281.2, a court will grant a petition to compel contractual arbitration upon determining "an agreement to arbitrate the controversy exists." Section 1281.2 contains an exception, however, where the court determines the petitioner has waived the right to arbitration. (*Id.*, subd. (a).)

Waiver claims receive close judicial scrutiny, and the party seeking to establish a waiver " 'bears a heavy burden of proof.' " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 375 (*Iskanian*).)

In *St. Agnes Medical Center, supra,* 31 Cal.4th at page 1196, the California Supreme Court established a multi-factor test for evaluating whether a party has waived a contractual right to arbitration. More recently, in *Iskanian*, the California Supreme Court reaffirmed the following factors as stated in *St. Agnes Medical Center* are relevant to the waiver inquiry: " ' " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.' " ' " (*Iskanian, supra*, 59 Cal.4th at p. 375.)

"Prejudice is the determinative issue." (*Bower, supra,* 232 Cal.App.4th at p. 1042.) Whether or not litigation results in prejudice is "critical" in waiver determinations. (*St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1203.)

" 'Prejudice sufficient for waiver will be found where instead of seeking to compel arbitration, a party proceeds with extensive discovery that is unavailable in arbitration proceedings.' " (*Bower, supra,* 232 Cal.App.4th at p. 1042; see also *St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1204 ["courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration"].) "Some courts have interpreted *St. Agnes Medical Center* to allow consideration of the expenditure of time and money in determining prejudice where the delay is unreasonable." (*Iskanian, supra,* 59 Cal.4th at p. 377.)

"The question of waiver is generally a question of fact, and the trial court's finding of waiver is binding on us if it is supported by substantial evidence." (*Bower, supra,* 232 Cal.App.4th at p. 1043.) We infer all necessary findings supported by substantial evidence and construe any reasonable inference in the manner most favorable to the ruling, resolving all ambiguities to support affirmance. "Reversal is not justified simply because the trial court could have potentially reached a different conclusion on the question of waiver." (*Ibid.*) Rather, we may reverse only "if the record establishes a lack of waiver *as a matter of law*." (*Ibid.*) However, when the relevant facts are undisputed and only one inference may reasonably be drawn from the facts, the waiver issue may be reviewed de novo. (*Ibid.*)

The parties disagree about the applicable standard of review in this case. LPL contends review should be de novo because "[t]here was no factual dispute as to what litigation the parties undertook." In contrast, plaintiffs contend the substantial evidence standard applies. As explained next, each party is only partially correct.

The threshold issue is whether the trial court correctly determined that the allegations in plaintiffs' first amended complaint were arbitrable. If they were, then LPL's (1) nine-month delay in seeking arbitration, (2) request for a court trial, (3) depositions of four plaintiffs, and (4) summary judgment motion will need to be examined to determine if LPL waived arbitration causing plaintiffs prejudice.

Conversely, if the action was not arbitrable until plaintiffs filed their second amended complaint, there is neither unreasonable delay nor litigation conduct inconsistent with a claimed right to arbitrate. (See *Allstate Ins. Co. v. Hisham Elzanaty* (E.D.N.Y. 2013) 929 F.Supp.2d 199, 211 (*Allstate Ins. Co.*) [" 'litigation involving non-arbitrable claims does not constitute a waiver' "].)

" 'In determining whether an arbitration agreement applies to a specific dispute, the court may examine only the agreement itself and the complaint filed by the party refusing arbitration . . . .' " (*Rice v. Downs* (2016) 247 Cal.App.4th 1213, 1223 (*Rice*).) Where there is no factual dispute as to the language of the agreement or conflicting extrinsic evidence regarding the terms of the contract, we review the court's determination of arbitrability under the de novo standard of review and we are not bound by the trial court's interpretation. (*Ibid*.)

Here, the trial court determined allegations in the first amended complaint "would have been enough to compel the case to arbitration." That determination is subject to de novo review because it involves applying the parties' arbitration agreement to allegations in the first amended complaint, and the parties offered no conflicting extrinsic evidence of their intent in entering into the arbitration agreement.

However, the trial court's subsequent determination that LPL waived arbitration by its unreasonable delay and litigation conduct, causing prejudice to plaintiffs, is reviewed under the substantial evidence standard. " 'Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court.' " (*Iskanian, supra,* 59 Cal.4th at p. 375.) De novo review of a trial court's determination of waiver is appropriate only where " ' "the facts are undisputed and only one inference may reasonably be drawn." ' " (*Ibid*.)

Here, although the parties do not dispute the timeline of litigation events, the reasonable inferences to be drawn from those facts are hotly disputed. Based on a variety of facts, plaintiffs assert—and LPL denies—that early on, LPL made a tactical decision to attempt to win by positioning the case for summary judgment, and only abandoned that strategy and demanded arbitration after the court allowed plaintiffs to file a second amended complaint.

Independent review of whether a party has waived arbitration is appropriate only when the facts permit just one reasonable inference. (*Iskanian, supra,* 59 Cal.4th at p. 375.) Here, where different inferences may be drawn depending upon the weight

given to certain facts, we review the trial court's waiver ruling under the more deferential substantial evidence standard of review. (*Bower, supra,* 232 Cal.App.4th at p. 1043.)

III. *THE COURT DID NOT ERR IN FINDING LPL WAIVED ARBITRATION*

A. *The First Amended Complaint Was Arbitrable*

LPL contends it did not engage in conduct inconsistent with the right to arbitrate, because until plaintiffs filed the second amended complaint, LPL had a "colorable claim" that its account agreement, which contains the arbitration provision, was not implicated. As explained *post,* we disagree because the arbitration language in LPL's agreement is extremely broad and does not require that controversies arise exclusively out of or relate to the plaintiffs' LPL accounts to be arbitrable. Moreover, even if the arbitration provision were limited to such controversies, the first amended complaint alleges Schmidt improperly liquidated plaintiffs' LPL accounts to fund the loans and therefore alleges arbitrable claims.

" ' "In California, the general rule is that arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute." ' " (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 397.) The party opposing arbitration has the burden of demonstrating that an arbitration clause cannot be interpreted to require arbitration of the dispute. (*Rice, supra,* 247 Cal.App.4th at p. 1223.) In light of California's strong public policy in favor of arbitration, " 'broad contractual provisions for arbitration are to be liberally construed.' " (*Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 738.) Arbitration should be

ordered " 'unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.' " (*Ibid.*)

Whether a contractual arbitration clause covers a particular dispute rests substantially on whether the clause in question is broad or narrow. (*Rice, supra*, 247 Cal.App.4th at p. 1224.) A " ' "broad" ' " clause includes those using language such as " ' "*any claim* arising from or *related to* this agreement." ' " (*Ibid.*) Such a broadly worded arbitration clause may extend to tort claims that may arise under or from the contractual relationship. (*Ibid.*) " ' "There is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. At most, the requirement is that *the dispute* must arise out of contract." ' " (*Ibid.*) " ' "[W]here contracts provide arbitration for ' "any controversy . . . arising out of or relating to the contract . . . " ' the courts have held such arbitration agreements sufficiently broad to include torts, as well as contractual, liabilities so long as the tort claims 'have their roots in the relationship between the parties which was created by the contract.' " ' " (*Ibid.*) " 'To require arbitration, [the] factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability.' " (*Ibid.*)

Here, the parties agreed that "any controversy . . . arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement" would be arbitrated. Such " ' " ' "relat[ed] to" ' " ' " language is extremely broad and extends to alleged liabilities, regardless of legal theory, that " ' " 'have their

roots in the relationship between the parties which was created by the contract.' " ' " (*Rice*, *supra*, 247 Cal.App.4th at p. 1224.)

The allegations in plaintiffs' first amended complaint are within the scope of the parties' arbitration provision. The first amended complaint alleges Schmidt was "an agent of LPL" and "was authorized by LPL" to provide investment and financial advice. Plaintiffs, clients of Schmidt and LPL, alleged they relied upon them for retirement planning and investment management. Plaintiffs also allege Schmidt liquidated securities in their respective LPL accounts to generate cash for the loans. They allege LPL is liable for Schmidt's misconduct because he was a "management level agent of LPL" and independently, because LPL "recklessly failed to exercise adequate supervision over Schmidt." (Some capitalization omitted.) These allegations—and in particular the allegations in paragraphs 30 and 33 that Schmidt liquidated securities in plaintiffs' LPL accounts to fund the loans—"relate to" plaintiffs' LPL "account[s]" and therefore are encompassed within that portion of the arbitration provision.

Moreover, the LPL arbitration agreement also encompasses "any controversy" with LPL "relating to . . . transactions with or for you." The first amended complaint alleges at least two such transactions: (1) loans plaintiffs made to Schmidt are transactions "with" plaintiffs, and (2) liquidation of securities in plaintiffs' accounts to fund the loans are transactions "for" plaintiffs. Therefore, claims against LPL alleged in the first amended complaint were also arbitrable under this provision.

In the trial court, LPL argued the "transactions with or for you" clause does not apply "because activity from which Plaintiffs are alleging liability has no connection to

LPL." However, in several different places, the first amended complaint alleges such a connection. For example, paragraphs 30 and 33 allege Schmidt liquidated plaintiffs' LPL accounts "to generate the cash necessary for this investment." Paragraph 38 alleges LPL is liable for the acts of Schmidt, a "management level agent of LPL . . . ." Paragraph 39 alleges LPL failed to adequately supervise Schmidt and that this failure "was symptomatic of lax supervision and compliance at the firm at the time of the transaction . . . ."

B. *Substantial Evidence Supports the Court's Finding of Waiver*

In denying LPL's motion to compel arbitration, the court considered the matter in light of the *St. Agnes Medical Center* factors. (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196.) The court found LPL "took action inconsistent with arbitration," and " 'the litigation machinery has been substantially invoked and the parties were well into preparation of the lawsuit before notification of the intent to arbitrate.' " The court also found plaintiffs would be prejudiced by LPL's "long delay" in seeking arbitration. These findings are supported by substantial evidence.

1. *Action inconsistent with arbitration*

There is substantial evidence LPL acted inconsistently with arbitration by: (1) asking for a court trial, (2) indicating in its case management statement it would not consent to binding arbitration, (3) taking all four plaintiffs' depositions and propounding other discovery, including a request for production of documents, and (4) bringing a

motion for summary judgment.[6] (See *Kelly v. Pub. Util. Dist. No. 2* (9th Cir. 2014) 552 Fed.Appx. 663, 664 [finding this element satisfied when the parties conducted discovery and litigated motions]; *Garcia v. Wachovia Corp.* (11th Cir. 2012) 699 F.3d 1273, 1277 [denying motion to compel arbitration when defendant "even went so far as to say that it did not intend to seek arbitration"]; *Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.* (8th Cir. 2009) 589 F.3d 917, 922 [holding that defendant acted inconsistently by seeking a decision on the merits, an immediate and total victory]; *Petroleum Pipe Ams. Corp. v. Jindal Saw Ltd.* (5th Cir. 2009) 575 F.3d 476, 480 ["A party waives arbitration by seeking a decision on the merits before attempting to arbitrate."]; *Bower, supra,* 232 Cal.App.4th at pp. 1043-1044 [party acted inconsistently with right to compel arbitration by propounding significant discovery]; *Guess?, supra*, 79 Cal.App.4th at p. 556 [conduct inconsistent with intent to arbitrate by answering the complaint, responding to discovery, participating in depositions, filing motion to stay without asserting a right to arbitrate]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451 (*Adolph*) [defendant waived arbitration by filing demurrers, engaging in discovery, and failing to assert arbitration in a case management statement].)

Citing *Creative Telecommunications, Inc. v. Breeden* (D. Hawaii 1999) 120 F.Supp.2d 1225 (*Breeden*), and many other federal cases, LPL contends an intent to

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6 Although the court did not rule on LPL's summary judgment motion, "[a] party's actions in litigation that are inconsistent with the right to arbitrate cannot be ignored simply because they did not succeed in achieving that party's goals." (*Bower, supra,* 232 Cal.App.4th at p. 1044.) "[T]he focus should be on what [defendant] sought and not necessarily on what it obtained" for purposes of assessing whether defendant acted inconsistently with the right to arbitrate. (*Ibid.*)

waive its right to arbitration may not reasonably be inferred from its conduct. However, *Breeden* actually supports the trial court's findings.

In *Breeden,* the party seeking to compel arbitration had "not made any substantive motions." (*Breeden, supra,* 120 F.Supp.2d at p. 1234.) Moreover, that party had "merely responded" to discovery and motions, and had generated "little of the litigation" himself. (*Ibid.*) Finding no waiver, the court in *Breeden* distinguished cases where the party seeking arbitration "allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate, such as by filing substantive motions." (*Id.* at p. 1233.) In particular, the *Breeden* court distinguished cases where waiver was found because a party "engaged in discovery" and filed a motion for summary judgment. (*Ibid.*) In contrast, the *Breeden* court found no waiver there because the party moving to compel arbitration "merely opposed [the other party's] motions and did not file any of its own substantive motions." (*Id.* at p. 1235.)

Breeden is factually off-point. LPL conducted its own discovery, deposing all four plaintiffs to set up its motion for summary judgment, and LPL filed a substantive motion, seeking summary judgment.

The many other federal cases LPL cites are also materially distinguishable, as follows: *LG Electronics, Inc. v. Wi-Lan USA, Inc.* (2d Cir. 2015) 623 Fed.Appx. 568 (no waiver where no discovery produced and demand for arbitration made only two weeks after that position was first disputed); *First Allmerica Financial Life Ins. Co. v. Sumner* (D. Or. 2002) 212 F.Supp.2d 1242, 1243 (no waiver where plaintiffs notified the court "early in the action" they intended to seek arbitration); *In re Banks* (Bankr. D. Or. 2016)

549 B.R. 257, 263 (motion to compel arbitration filed in 48 days from initial response, no substantial costs incurred in discovery); *Mitsui & Co. (USA), Inc. v. C&H Refinery, Inc.* (N.D.Cal. 1980) 492 F.Supp. 115, 119 (no waiver where "[l]ittle of substance has occurred in this lawsuit" and "little discovery has been conducted"); *AT&T Corp. v. Vision One Security Systems* (S.D.Cal. 1995) 914 F.Supp. 392, 397 (no waiver where litigation conduct was directed to only the nonarbitrable claims and "no action has occurred with respect to" the arbitrable claim); *Irwin v. UBS Painewebber, Inc.* (C.D.Cal. 2004) 324 F.Supp.2d 1103, 1111 (mixed action, defendant's litigation conduct directed to only the nonarbitrable claims); *Richards v. Ernst & Young, LLP* (9th Cir. 2013) 744 F.3d 1072, 1075 (no waiver where discovery was not used to gain information about the other side's case that could not have been gained in arbitration); *Biernacki v. Service Corp. Int'l* (9th Cir. 2013) 533 Fed.Appx. 741, 742 (no waiver where no showing of prejudice beyond court costs and legal expenses); *Allstate Ins. Co., supra,* 929 F.Supp.2d at pages 210-211 (no waiver where there was just "one minor piece of discovery" and other litigation conduct was directed to nonarbitrable claims); *Interstate Securities Corp. v. Siegel* (S.D.N.Y. 1988) 676 F.Supp. 54, 57 (no waiver where only prejudice is expense and delay of conducting discovery); *Brownstone Investment Group, LLC v. Levey* (S.D.N.Y. 2007) 514 F.Supp.2d 536, 544-545 (no waiver where discovery would have been available in arbitration); and *Quilloin v. Tenet HealthSystem Philadelphia, Inc.* (E.D.Pa. 2011) 763 F.Supp.2d 707, 719, reversed on other grounds, *Quilloin v. Tenet HealthSystem Philadelphia, Inc.* (3d Cir. 2012) 673 F.3d 221 (no waiver where delay

caused in part by challenge to personal jurisdiction, arbitration was raised in defendant's answer, and party seeking arbitration had not contested merits).

2. *Prejudice*

Substantial evidence also supports the trial court's finding of prejudice. "[C]ourts have found prejudice where the petitioning party used the judicial discovery process to gain information about the other side's case that could not have been gained in arbitration . . . ." (*St. Agnes Medical Center, supra,* 31 Cal.4th at p. 1204.) Under applicable FINRA arbitration rules, depositions are not permitted except in limited circumstances not applicable here. In a declaration opposing LPL's motion to compel arbitration, plaintiffs' counsel stated, "In roughly 30 years of securities litigation practice in which I have handled numerous NASD and FINRA arbitrations, I cannot think of one arbitration case in which a deposition took place. It is extremely rare and would not be permitted in this case."

By litigating the case in court instead of arbitration, LPL was able to depose the plaintiffs. "The vice was in the use of discovery processes to gain information which defendants could not have gained in arbitration," and this is substantial evidence supporting a finding of prejudice without any further specific showing of how that information disadvantaged the plaintiffs. (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366.) Moreover, by deposing plaintiffs, LPL was able to gauge their strengths and weaknesses as witnesses, and therefore was able to obtain an unfair advantage that would not have been available in arbitration proceedings. (See *Guess?, supra,* 79 Cal.App.4th at p. 558 [the courtroom may not be used as a staging area for arbitration].)

Further, LPL's motion for summary judgment (also not generally available in arbitration) extensively cited and relied on the plaintiffs' deposition testimony. Approximately 78 out of the first 100 "undisputed material facts" upon which LPL based its motion for summary judgment were supported by citations to one or more of the plaintiffs' depositions.

After obtaining discovery from plaintiff by court processes, defendants then belatedly sought to change decision makers and process—to arbitration, where deposition discovery is largely prohibited. Although LPL's participation in deposition discovery would not necessarily compel a finding of prejudice, this presents a factual question for the trial court. Here, the trial court could reasonably find the discovery conducted by LPL worked an unfair advantage if arbitration were ordered. These facts support the trial court's finding of waiver. (See *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 215.)

Prejudice can also arise from unreasonable and unexcused delay in seeking to compel arbitration because such conduct undermines the important public policy of arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 360-361.) In *Iskanian*, the California Supreme Court noted that merely participating in litigation and causing the party opposing arbitration to incur costs and legal fees does not, by itself, constitute prejudice sufficient to result in a waiver of the right to arbitrate. (*Iskanian, supra,* 59 Cal.4th at p. 377.) However, the court recognized that the expenditure of time and money is a relevant factor in assessing prejudice in cases where the delay was unreasonable. (*Ibid*.)

The court noted a line of cases finding that "unjustified delay, combined with substantial expenditure of time and money, deprived the parties of the benefits of arbitration and was sufficiently prejudicial to support a finding of waiver to arbitrate." (*Ibid.*)

There is substantial evidence supporting a finding that LPL made a tactical decision to delay seeking arbitration. In his declaration, plaintiffs' attorney stated, "Summary judgment/adjudication is not a motion recognized under FINRA rules . . . ." He also attached to his declaration FINRA arbitration rule 12504, stating, "Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration." Plaintiffs' counsel recounts a conversation with LPL's counsel during a break in a deposition, when LPL's lawyer "expressed confidence the Court would grant summary judgment in favor of LPL," boasting he had prevailed "repeatedly in Court in selling away cases by winning summary judgment . . . ." In sum, according to plaintiffs' counsel's declaration, LPL elected to forgo arbitration as a strategic decision to attempt to prevail on summary judgment, a procedure not available in arbitration. LPL changed tactics, seeking to compel arbitration, only when its summary judgment motion was delayed, or completely derailed, by the court's order allowing plaintiffs to file their second amended complaint.

The court made a finding that although both sides accused each other of gamesmanship, in that regard "it is the conduct of defendant that is most relevant." From this evidence, the court could reasonably infer that LPL chose to conduct discovery and file a summary judgment motion because it saw an advantage in pursuing that course of action in the judicial forum. Accordingly, LPL's nine-month delay in seeking to compel

arbitration was unreasonable and unexcused because it resulted from conduct neither consistent with the right to arbitrate nor compelled by any law. Under these circumstances, the court could properly consider whether the expenditure of attorney time deprived plaintiffs of the benefits of arbitration and was sufficiently prejudicial to amount to a waiver of LPL's right to arbitrate. (*Bower, supra,* 232 Cal.App.4th at p. 1049.)

Many cases have found waiver under less compelling circumstances. (See, e.g., *Guess?, supra,* 79 Cal.App.4th at pp. 556, 558 [sufficient evidence of prejudice during delay period of less than four months where defendant answered and responded to discovery, participated in depositions]; *Adolph, supra,* 184 Cal.App.4th at pp. 1451-1452 [sufficient evidence of prejudice during six-month delay in demanding arbitration where defendant filed demurrers, engaged in discovery, and failed to assert arbitration in case management conference statement]; *Roberts, supra,* 200 Cal.App.4th at pp. 844-845 [five-month delay during which time plaintiff conducted discovery].) Accordingly, substantial evidence supports the court's finding that LPL's unwarranted delay in seeking arbitration prejudiced plaintiffs by depriving them of a primary benefit of contractual arbitration.

"A party that signs a binding arbitration agreement and has subsequently been sued in court has a choice: it can either seek to compel arbitration or agree to litigate in court. It cannot choose both. A party may not delay seeking arbitration until after the . . . court rules against it in whole or in part; nor may it belatedly change its mind after first electing to proceed in what it believed to be a more favorable forum. Allowing it to do so would result in a waste of resources for the parties and the courts and would be

manifestly unfair to the opposing party." (*Martin v. Yasuda* (9th Cir. 2016) 829 F.3d 1118, 1128.)

DISPOSITION

The order is affirmed. Plaintiffs James J. Dagostino, Carolyn Steeves, Leslie Wyman, and Marilyn Wyman to recover costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.